No. 898

APR 22 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940.

INDEPENDENT WAREHOUSES, INC.,
Self-Insured Employer,
Petitioner,

vs.

REGINA CELESTE DIMINO, widow, on behalf of herself and minor child, Joseph Lawrence Dimino, on account of the death of Joseph Dimino, deceased, and STATE INDUSTRIAL BOARD OF THE STATE OF NEW YORK,
Respondents.

BRIEF ON BEHALF OF REGINA CELESTE DIMINO, RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

WILLIAM L. F. GARDINER,
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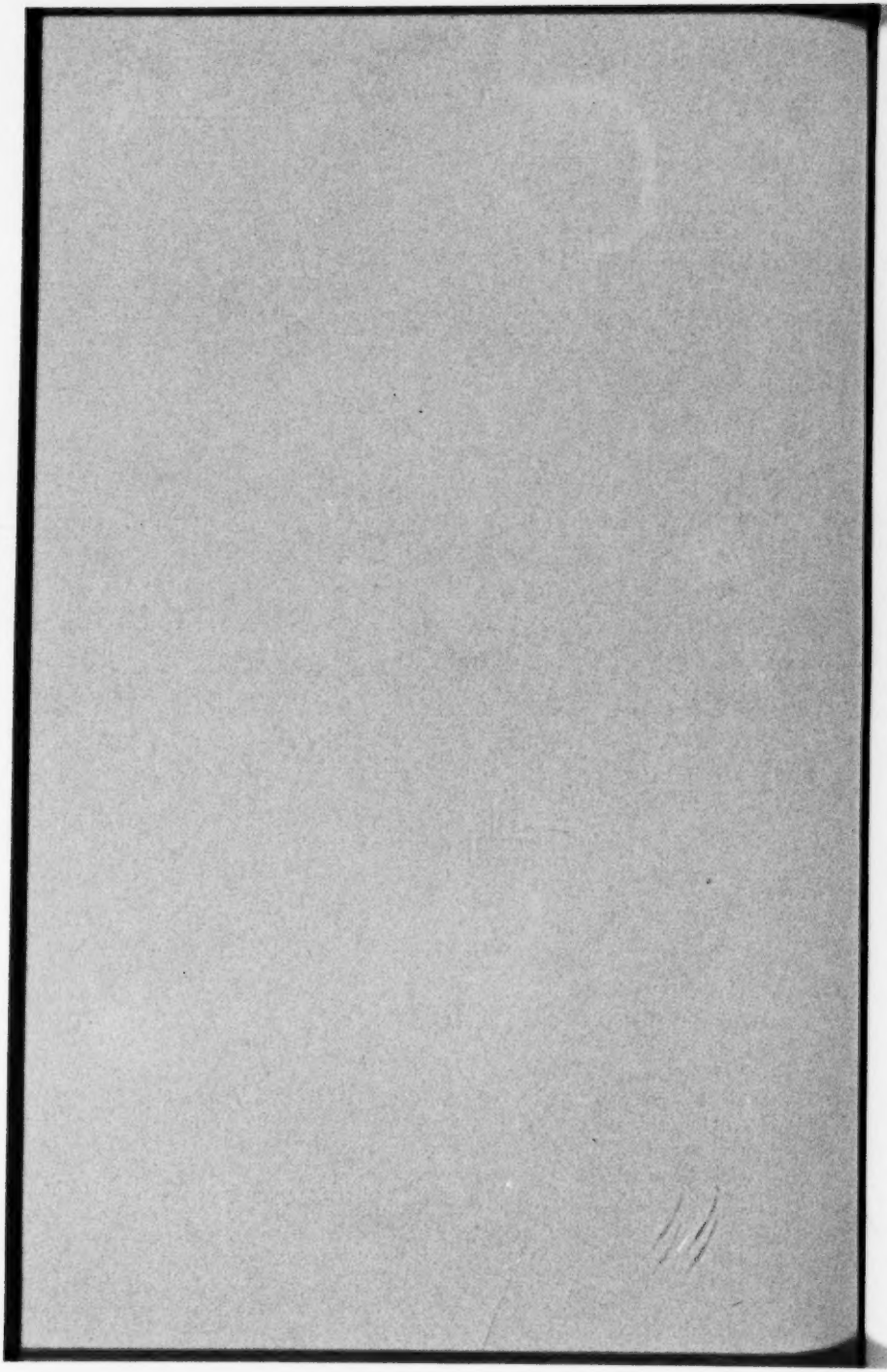
Regina Celeste Dimino.

Court Press, 136 Cedar Street, N. Y. C.



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Statement of the Case.

Independent Warehouses, Inc., the employer and petitioner herein, was engaged in the warehouse business and maintained, operated and controlled Pier 68, situated at 20th Street, East River, New York City (R. 30).

Joseph Dimino was employed by the employer-petitioner as superintendent of this pier, and had entire charge of the pier (R. 48).

Each week a ship would arrive at this pier with newsprint rolls destined for various newspapers in the city. Before the arrival of a ship, Joseph Dimino would receive a plan of the ship showing the location

of the newsprint rolls on the ship, and also giving the size, weight and other details regarding these rolls (R. 33, 34, 60).

Joseph Dimino would indicate to the independent stevedoring company how many stevedores would be required to unload the ship (R. 33).

He would also advise the United States Trucking Company, an independent contractor which removed newsprint rolls from the pier, to various news plants, the number of trucks that would be needed (R. 33).

On the Monday morning following the arrival of a ship, Joseph Dimino would request the head stevedore to unload the hatches in the order he considered proper (R. 37).

Joseph Dimino went on the ship at times to secure information relative to the performance of his duties on the pier. This information was obtainable on the pier (R. 43).

While he was on the ship endeavoring to obtain certain information relative to his work on the pier he fell down a hatch and sustained injuries which resulted in his death (R. 50).

The work of unloading the cargo of the ship was performed by an independent stevedoring company (R. 42). Such work was supervised by a boss stevedore who was employed by the same concern (R. 60).

Independent Warehouses, Inc., the employer and petitioner herein, was not engaged in the performance of any maritime work and there was no privity between it and the independent stevedoring company that unloaded the cargo of the boat (R. 60).

There was no privity between Independent Warehouses, Inc., the employer and petitioner herein, and the owner of the ship, or the United States Trucking Company which removed the newsprint rolls from the pier.

The State Department of Labor and the State Industrial Board of the State of New York made awards of disability and death benefits to the respondent, Regina Celeste Dimino (R. 6, 7, 9). The State Industrial Board found that at the time of his injuries Dimino was not engaged in performing work of a maritime nature, and the work performed by him bore no relation to navigation but was a matter of local concern. The Board also found that Dimino had no direct supervision or control of the stevedores and that his presence on the ship was incidental to his employment on the dock and arose out of problems connected with such work (R. 4).

The petitioner appealed to the Appellate Division of the Supreme Court of New York, Third Judicial Department, which Court, by an order entered June 25, 1940, reversed the awards of the State Industrial Board and dismissed the claims of the respondent on the ground that Dimino was engaged in a maritime service on navigable waters at the time of his injuries, and that the State Industrial Board had no jurisdiction (R. 73). Presiding Justice Hill and Justices Bliss, Schenck and Foster concurred in the decision, while Justice Crapser dissented (R. 72) (259 App. Div. 942).

An appeal was taken to the Court of Appeals of the State of New York, which Court, by an order dated December 31, 1940, reversed the order of the Appellate Division of the Supreme Court, Third Judicial Department, and affirmed the awards of the State Industrial Board (R. 79). An opinion was rendered by Judge Loughran, and was concurred in by Judges Finch, Rippey, Sears and Lewis; Chief Judge Lehman and Judge Conway dissented (R. 76) (284 N. Y. 481).

The Court held that the State Industrial Board had jurisdiction of the case and that the State Industrial Board was correct in finding that Dimino had no direct supervision or control of the stevedores (R. 77). It further held that Dimino at the time of his injuries was not engaged in performing any work of a maritime nature, and that his work bore no relation to navigation, but was a matter of local concern (R. 78). The Court found that there was nothing in the record to show that the information sought by Dimino upon the ship was not available on the shore (R. 77).

POINT I.

The Court of Appeals of the State of New York expressly followed the rules laid down by the United States Supreme Court in deciding the case at bar.

The petitioner in its brief misapprehends the facts. It seeks to have the law governing maritime services of a stevedore applied to the case at bar.

Neither the petitioner nor its employee, Joseph Dimino, was engaged in work of a maritime nature. The stevedoring work was performed by an independent stevedoring company which had no privity whatever with the petitioner herein nor its employee, Joseph Dimino.

The Court of Appeals in its opinion stated (R. 78):

> "We think the foregoing decisions of the highest court of the nation rule the case in hand and sanction the conclusion of the State Industrial Board that, 'At the time the said Joseph Dimino sustained the accidental injuries which resulted

in his death, he was not engaged in performing any work of a maritime character or nature and said work bore no relation to navigation but was a matter of local concern'."

The first case cited by the Court of Appeals in its opinion is *Grant Smith-Porter Company* v. *Rhode,* 257 U. S. 469. In this case a carpenter, received injuries while at work on a partially completed vessel lying at a dock in a navigable stream and sought recovery under the Workmen's Compensation Law of the State of Oregon. The parties had made contributions under the compensation law of that state. The employer was engaged in constructing steam vessels for the United States Government. At the time of the injuries to the claimant, the vessel that the claimant was working upon had been substantially completed. The Court held that the contract for constructing the vessel was non-maritime, although the vessel was in navigable waters and neither Rhode's general employment nor his activities at the time had any direct relation to navigation or commerce, that the regulation of the rights and obligations of the parties by a local rule did not necessarily work material prejudice to any characteristic feature of the general maritime law or interfere with the proper harmony or uniformity of that law in its international or interstate relations.

Another case cited by the Court of Appeals in its opinion is *Millers' Indemnity Underwriters* v. *Braud,* 270 U. S. 59. In that case the plaintiff's intestate while engaged as a diver by a building company, submerged himself from a floating barge anchored in a navigable river in Texas for the purpose of sawing

off timbers of an abandoned set of ways. While submerged, he was suffocated. Damages for his death were recovered from the employer insurer under the Workmen's Compensation Law of the State of Texas. The employer in appealing to the United States Supreme Court alleged that the claim arose out of a maritime tort; that the rights and obligations of the parties were fixed by the maritime law; and that the state had no power to change those by statute. The Supreme Court, in affirming the award, stated, at page 64:

> "In the cause now under consideration, the record discloses facts sufficient to show a maritime tort to which the general admiralty jurisdiction would extend save for the provisions of the State Compensation Act; but the matter is of mere local concern and its regulation by the State will work no material prejudice to any characteristic feature of the general maritime law."

The case at bar is on all fours with the case of *Rosengrant* v. *Havard,* 273 U. S. 664. In this case which is cited in the opinion by the Court of Appeals, the deceased was employed as a lumber inspector, checker and grader. His duties were to grade and tally lumber which was being removed from barges into the planing mill of his employer. He was standing on a moored vessel, checking lumber being unloaded from a barge alongside, when he was injured. In this case neither the employer nor the employee was engaged in performing any maritime service.

The basis of the Court's decision in the *Rosengrant* case was pointed out in the decision of *Norton* v. *Gulf*

Refining Co., 94 Fed. (2nd) 380, where the Court distinguished the *Rosengrant* case as follows (p. 381):

> "In that case Rosengrant was a lumber checker, employed by a company which had a lumber yard, and his checking of the lumber could as well have been done on shore after the lumber left the vessel. There was no necessity for his going on the barge."

In the *Rosengrant* case the employee performed no maritime services. He could have checked and graded the lumber on shore as well. It was not necessary for him to go on the barge. In the case at bar, Joseph Dimino likewise performed no maritime services and he too could have secured the information he needed on the shore since he had no duties connected with the unloading of the boat. His services were not of a maritime nature.

In the *Matter of Heaney* v. *Carlin Construction Company*, 269 N. Y. 93, the claimant was a bricklayer and was injured by an explosion on a boat in navigable waters while being transported to work on an adjacent island. The employer claimed an award of compensation could not be maintained because the maritime law was applicable. The Court of Appeals decided to the contrary, however.

The decision of the Court of Appeals was affirmed in 299 U. S. 41, the court stating at page 44:

> "This Court has often ruled that the maritime law cannot be modified by state enactments so as materially to interfere with its essential uniformity. *State Industrial Commission* v. *Nordenholt, supra.* But this doctrine we think has no

> application in the circumstances here presented. The present attempt is to enforce a liability assumed by an employer and insurance carrier under a non-maritime contract. All the parties, as well as the accident, were within the limits of New York State. The contract had no direct relation to navigation; to enforce it against the parties before us will not materially interfere with the uniformity of any maritime rule. There is no claim against the ship or her owner; their rights are not in issue."

In the case at bar we likewise have an attempt to enforce a liability assumed by the employer under a non-maritime contract. All the parties as well as the accident are within the limits of New York State. The contract of employment has no direct relation to navigation or commerce. To enforce it against the parties herein will not materially interfere with the uniformity of any maritime rule. There is no claim against the ship, the owners thereof or the stevedoring company. Their rights are not in issue.

POINT II.

The petition herein does not disclose facts sufficient to warrant the granting of the writ of certiorari.

The question of law attempted to be raised by the petitioner presents no question that should be reviewed by this court. "However important the case may be to the petitioner the question involved is not one of gravity and general importance. There is no conflict between the decisions of State and Federal Courts or between those of Federal Courts of differ-

ent circuits. There is nothing affecting the relations of this nation to foreign nations and, in addition, no matter of general interest to the public" (*Fields* v. *United States*, 205 U. S. 292, 296).

CONCLUSION.

It is, therefore, respectfully submitted on behalf of the respondent, Regina Celeste Dimino, that the petition for a writ of certiorari herein should be denied.

WILLIAM L. F. GARDINER,
Counsel for Respondent,
Regina Celeste Dimino.